IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM H. REID,
Petitioner,

vs.

SANDY LYNN NELSON, an infant, by EDNA NELSON, her next friend, EDNA NELSON and EDWIN S. NELSON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUDGES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of William H. Reid respectfully shows:

This is an action at law brought in the District Court of the United States for the Southern District of Florida by Sandy Lynn Nelson, a minor, and her parents, against the petitioner and his wife, for damages resulting when

a dog owned by your petitioner bit the child. It is a diversity case.

Liability, without regard to negligence, is imposed by a Florida Statute upon the owners of dogs which injure persons or property.

The trial was by jury and resulted in a verdict for the minor child for $2200.00 for pain and suffering, and for the parents for $8550.00 for loss of the child's earnings (R. 223). The Circuit Court of Appeals reversed the judgment of the lower court against petitioner's wife for lack of evidence of ownership of the dog (R. 250 and 253).

No complaint is made here of the verdict for pain and suffering of the child. The petitioner made a motion for a new trial in the District Court upon the ground that the verdict for the parents' loss of the child's earnings was grossly excessive (R. 225) but it was denied. In the Circuit Court of Appeals, two contentions, in the alternative, were advanced by your petitioner:

(a) that there was no evidence upon which a a verdict of $8550.00 could be found by the jury;

(b) that it was the right and the duty of the Circuit Court of Appeals to review the evidence to determine whether the $8550.00 verdict was excessive, and if so, to order a remittitur or a new trial.

The Circuit Court of Appeals ruled against the peti-

tioner upon the first contention, and no complaint is here made of that ruling. The second contention was also overruled and this ruling forms the basis of this petition. The opinion and judgment are dated April 10, 1946. It has not yet been officially reported (R. 249 and 253).

The statutory provision believed to sustain the jurisdiction of this court is Section 347(a) of Title 28 of the United States Code.

In filing this petition, your petitioner realizes he carries a considerable burden. In several cases in this court, it has been held that the 7th Amendment to the Constitution of the United States prevents the review by a Federal appellate court of a jury's verdict. The latest of these cases is **Dimick v. Schiedt**, 293 U. S. 474, in which the history of control by both trial and appellate courts of jury verdicts is rather fully reviewed.

In that case, five justices (Sutherland, McReynolds, Van Devanter, Butler and Roberts) held that the 7th Amendment "froze" the practice of court control over jury verdicts as it existed in the English Courts in 1791. Four justices (Stone, Hughes, Brandies and Cardozo) dissented in an eloquent and forceful opinion delivered by the late Chief Justice. The fundamental ground of the dissent was that the "common law" referred to in the Amendment was not the practice of the English judges of 1791, but a system of a growing and developing body of legal thinking.

The dissenting opinion points out that in no other connection is the phrase "the common law" given so restricted a meaning as that expressed in the majority opin-

ion, and even the majority opinion concedes the rule to be undesirable and adopts it only out of respect for its comparative antiquity.

The dissenting opinion also observes that the so-called rule has been more honored by lip-service than by observance. More recent developments in Federal Court practice, such as Rule 52 relating to the effect of the one-man-jury's findings of fact in jury-waived cases, and Rule 48 dealing with majority jury verdicts, demonstrate that the substance of the "freezing" rule is being gnawed away by a professional dissatisfaction which this court seems to share.

Professional dissatisfaction with the "freezing" rule apparently began shortly after Mr. Justice Story first announced it on Circuit in 1822. Efforts to overthrow or circumvent it have continued up to the present year. If a rule has not gained professional acceptance in 124 years, it is probably a bad rule, and means should be found to change it. This same sort of professional dissatisfaction followed **Swift v. Tyson** and led eventually to **Erie R. R. v. Tompkins.**

Some of the Circuit Courts of Appeal have circumvented the effect of the rule by saying that they have the power to determine whether the trial court had abused its discretion in denying a motion for a new trial based on the excessiveness of the verdict. (**Cobb v. Lepisto,** 6 Fed. (2) 128, and **Department of Water and Power v. Anderson,** 95 Fed. (2) 577). Other circuits have, with the tacit approval of this court, engrafted an exception in "passion and prejudice" cases. **Peitzman v. City of Illmo,**

141 Fed. (2) 956, certiorari denied, 323 U. S. 718, rehearing denied, 323 U. S. 813.

The Fifth Circuit, while following the rule, says:

> "The most an appellate court can do, if it thinks the verdict not according to the weight of the evidence, is to scan the trial more closely for error."
>
> **Home Ins. Co. of New York v. Tydal Co.**, 152 Fed. (2) 309.

The rather vague content of phrases like "passion and prejudice" or "abuse of discretion" or "harmless error" is such that it takes no great mental agility to fit into these categories almost any case in which the Appellate Court feels that injustice is being perpetrated by a jury's verdict.

It is by this petition suggested that the views of the majority of the court in **Dimick v. Schiedt** should be rejected and that the views of the four dissenting justices should be adopted as the views of this court.

Such a ruling would be consistent with that form of mental honesty which prefers openly to discard an outmoded or undesirable rule of law, rathen than to riddle it with enervating exceptions and distinctions until its substance has disappeared.

This petition further suggests that the right to an appellate review is a matter of substantive law, not merely one of procedure, and that an appellate review should ex-

tend to all phases of a law suit which materially affect the rights and duties of the parties. Certainly the amount a defendant has to pay materially affects him.

Under **Erie R. R. Co. v. Tompkins,** 304 U. S. 64, Federal Courts, in diversity cases, administer the law of the states in which they sit. If this identical law suit has been tried in the courts of Florida, the appellate court of that state would have had the right and duty to review the evidence to determine whether the verdict was excessive. By the accident of diversity of citizenship, and that alone, this case is in a Federal court, and your petitioner has been denied a right he would have had in the State court.

There is no element of consent on the part of the petitioner. This suit was not removed from the State court. It was originally filed in the Federal Court.

Every evil and every logical inconsistency that led to the decision in **Erie R. Co. v. Tompkins** exists in this case, and every motive that impelled that decision impels a reversal here.

If the "freezing" rule of **Dimick v. Schiedt** be rejected, then the "common law" of the 7th Amendment becomes the common law of the state in which the court sits and the amount which your petitioner must pay to discharge his liability will be determined in the same way it would be in the courts of the state which created that liability.

The Circuit Court of Appeals refused to consider the evidence to determine whether the verdict was excessive.

Your petitioner submits that the writ of certiorari should be granted as prayed.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 11,448, William H. Reid and Jessie Reid, Appellants, versus Sandy Lynn Nelson, an infant, by Edna Nelson, her next friend, Edna Nelson and Edwin S. Nelson, Appellees, to the end that this cause may be reviewed and determined by this Court, as provided for by the Statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated the ..... day of May, 1946.

JAMES A. DIXON,
Attorney for Petitioner,
908 First National Building,
Miami, Florida.